IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 425 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BISMILLAH CHANDSHA FAKIR

Versus

STATE OF GUJARAT

Appearance:

MRS NISHA M PARIKH for Petitioner No. 1

MR BY MANKAD, APP for Respondent No. 1

MR PRAVIN GONDALIYA for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 19/09/2001

ORAL JUDGEMENT

1. This Revision is preferred by original complainant being aggrieved by the order passed by learned Judicial Magistrate, First Class, Limbdi, District Surendranagar, on 5th February, 2000, dismissing the complaint of the complainant as per the provisions of

Section 203 of the Criminal Procedure Code.

2. The present applicant filed one private complaint in the Court of learned JMFC at Limbdi, which was registered as Criminal Inquiry Case No. 3 of 2000 under Sections 440, 363, 496 and 497 of the Indian Penal Code. As per the allegation of the complainant, he was married to one Roshanbanu @ Mariyambanu on 2nd of March, 1968. The complaint is filed against one Hasamsha Jivasha Fakir. As per the grievance made, complainant and Roshanbanu were living as husband and wife and due to this wedlock there was birth of one daughter Madina. Thereafter, the complainant went to Kathiyawad alone for labour work and in the absence of the complainant, without the permission of the complainant, mother-in-law Jiviben, brother-in-law Bhikhusha along with the accused of this complaint came to the resident of complainant at Mulbawla and take Roshanbanu on the pretext that there was an occasion of marriage in the relation. Thereafter, when complainant returned from Kathiyawad to his resident at Mulabwla, the complainant came to know that Roshanbanu was taken to Village Degam, Tal.Patadi, Dist. Surendranagar by his above mentioned relatives. The complainant went to Degam, but mother-in-law and brother-in-law insulted the complainant and threatened that if again he visits Degam, he would be beaten. Thereafter, according to the complainant, Roshanbanu Mariyambanu along with his daughter Madina were staying at Degam and Roshanbanu lives with the accused Hasamsha Jivasha Fakir in adultery. It is stated that Roshanbanu @ Mariyambanu has not been divorced as per Muslim Law by the complainant and hence the complaint under Sections 496, 497 and 363 of the Indian Penal Code has been filed.

3. On filing the complaint, learned Magistrate recorded the verification of the complainant on the same day on oath, wherein he has stated that after the marriage, Roshanbanu was staying with the complainant and Madina was born and when the complainant left for the labour work at distant place, Roshanbanu was taken to her parents house at Degam. The complainant asked the relations of Roshanbanu to return Roshanbanu to him but he was threatened. Roshanbanu is living with the present accused as husband wife in adultery.

4. From the above verification, learned Magistrate, passed an impugned order and stated that no offence was disclosed by the facts mentioned in the complaint or in verification as to invite the charge under Sections 440, 363 and 496 of the Indian Penal Code. It was also stated by the learned Magistrate in the order that against

Roshanbanu, another Criminal Case No. 746 of 1994 has been filed by the present complainant under Sections 497 of the Indian Penal Code. Learned Magistrate observed that since there was no prima facie case under Sections 440, 363 and 396 of the IPC, dismissed the complaint as per Section 203 of the Cr. Procedure Code.

5. Learned Advocate Mrs.Nisha N. Parikh for the applicant, learned APP Mr. B.Y.Mankad for respondent No.1 State and learned Advocate Mr. Pravin Gondaliya for respondent No.2 - original accused, were heard.

6. It was argued that as per the facts mentioned in the complaint, the petitioner had gone to Kathiyawad alone for the labour work and in the absence of the complainant, the relatives of Roshanbanu under the false pretext took Roshanbanu to Degam. It is alleged that Roshanbanu was never divorced by the petitioner and she is legally wedded wife of the complainant. Therefore, the learned Magistrate erred in arriving at a decision that there was no prima facie case against the accused. Since, Roshanbanu has been taken away from the applicant by the relations of Roshanbanu from the lawful custody of the complainant, the offences punishable under Sections 363, 496, 497 and 440 of the IPC is prima facie disclosed. It was urged that therefore the order impugned be set aside and the learned Magistrate be directed to proceed with the complaint.

7. On the other hand, learned Advocate Mr. Gondaliya for respondent No.2 has urged that no case for the charges mentioned in the complaint is disclosed prima facie by the verification recorded by the Magistrate. In the statement on oath, the complainant has stated nothing else except Roshanbanu is living as wife of the present accused - respondent No.2. This complaint is filed against accused - respondent No.2 Hasamsha Jivasha Sha alone. Since there was no prima facie case as per the verification and the complaint of the complainant, the learned Magistrate has rightly dismissed the complaint under Sec. 203 of the Cr.P.C. Learned APP Mr. B.Y. Mankad for respondent No.1 - State of Gujarat was heard.

8. It appears that the complaint in question has been dismissed by the learned Magistrate under Section 203 of the Cr.P.C. on the ground that there was no prima facie case against the accused as has been disclosed by the complainant in the verification. The charges which are levelled against the present respondents No.2 in the complaint are under Sections 440, 363, 496 and 497 of the

Indian Penal Code. Sec. 440 of the IPC will have application only when the person commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, and for that committing such offence mischief is an essential ingredient as per Section 440 of the Indian Penal Code. As per Section 425 of the IPC, the person is said to commit mischief with an intention to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property. In this view of the matter, while pursuing the complaint and the verification, no single ingredient is disclosed to sustain the charge under Section 440 of the Indian Penal Code. Like wise, no ingredient is disclosed for the charge under Section 363 of the IPC against the accused. There is no evidence that someone has abducted or enticed a minor under 16 years of age. In this case, female under 18 years of age, out of the keeping of the lawful guardian of such minor without the consent of such guardian. There is no iota of any ingredient disclosed by the complaint or verification as to attract the charge under Section 363 of the Indian Penal Code. So far as Section 496 of the Indian Penal Code is concerned, the same is attracted only when whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married. So far as the charge under Section 497 Adultery is concerned, learned Magistrate has observed in the order that against the present accused, the complainant has filed another complaint being Criminal Complaint No.746 of 1994 for adultery. In this view of the matter, and more so when, criminal case of the same charge is pending against accused on same facts the trial court was right in dismissing the complaint. While other allegations are against the relatives of Roshanbanu and they are not against the accused in this complaint.

9. Therefore, in this view of the matter, the learned Judicial Magistrate, First Class, Limbdi, has rightly dismissed the complaint under Section 203 of the Cr. Procedure Code observing that there was no prima facie case disclosed against the accused as alleged by the complainant. Hence, no interference is called for in the impugned order under revisional jurisdiction of this Court. Accordingly, this Revision stands dismissed. Rule is discharged.

(J.R. Vora, J.)

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